IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A16 of 2012

BETWEEN:

ATTORNEY-GENERAL FOR THE STATE OF SOUTH AUSTRALIA
Appellant

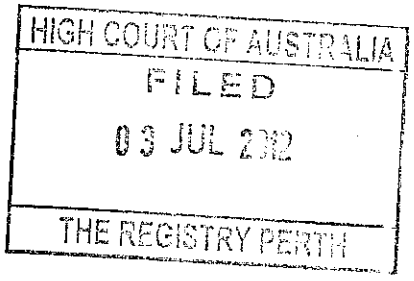
and

THE CORPORATION OF THE CITY OF ADELAIDE
First Respondent

CALEB CORNELOUP
Second Respondent

SAMUEL CORNELOUP
Third Respondent

WRITTEN SUBMISSIONS OF THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA (INTERVENING)



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Prepared by:

STATE SOLICITOR FOR WESTERN AUSTRALIA
LEVEL 16, WESTRALIA SQUARE
141 ST GEORGES TERRACE
PERTH WA 6000
SOLICITOR FOR THE ATTORNEY GENERAL FOR WESTERN AUSTRALIA

TEL: (08) 9264 1888.
FAX: (08) 9264 1111
SSO REF: R B Phillips: 1854-12
EMAIL: sso@sso.wa.gov.au

PART I: SUITABILITY FOR PUBLICATION

1. This submission is in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney General for Western Australia intervenes pursuant to s. 78A of the *Judiciary Act 1903* (Cth) in support of the Appellant and the First Respondent.

PART III: WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV: RELEVANT CONSTITUTIONAL PROVISIONS AND LEGISLATION

4. See Part VII of the Appellant's Submissions.

PART V: SUBMISSION

5. These submissions address the following matters. *First,* construction of By-Law 2.3. *Second,* the manner in which the question of validity of the by-laws, in the sense of whether they arise from a valid exercise of the "rule making power", interacts with any question of invalidity, by reason of infringement of the implied freedom of political communication. *Third,* whether the by-laws, properly construed, infringe the implied freedom of political communication.

6. The submissions advanced as to the validity of By-Law 2.3 emerge from a particular construction of the by-law, and the submissions in this respect supplement those advanced by the Appellant.

***First* - Construction of By-Law 2.3**

7. The by-laws relate only to "roads" within the municipality. For the purpose of the by-laws, "road" means a public or private street, road or thoroughfare to which public access is available on a continuous or substantially continuous basis to vehicles or pedestrians or both and includes a bridge, viaduct or subway; or an

alley, laneway or walkway.[1] The extent of roads within the municipality is explained in the judgment at first instance.[2] *By-Law No. 3 – Local Government Land* contains equivalent restrictions in respect of any "local government land" which means "all land vested in or under the control of the Council (except streets and roads)". Consideration of the practical operation[3] of By-Law 2.3 may involve having regard to the practical interactive operation of By-Law No. 3 and By-Law 2.3.

8. Central to the proper construction of By-Law 2.3 is the proviso. The by-law (relevantly) provides that; *first,* a person can (without permission) preach, canvass, harangue, tout for business and conduct any survey or opinion poll on any road provided that it is within a designated area resolved by the Council and known as a "Speakers Corner"; *secondly,* a person can, on any road, without permission, conduct any survey or opinion poll that is conducted by or with the authority of a candidate during the course of a Federal, State or Local Government Election or during the course and for the purpose of a Referendum. There is no challenge to the validity of the restrictions on touting for business and conducting surveys and opinion polls.[4]

9. The Council had not resolved to designate an area as a Speakers Corner.[5] Even so, validity of the by-law cannot be approached by disregarding or ignoring the proviso. Restriction of the freedom of political communication by means of designation of an area and limitation of the freedom beyond it,[6] is not *per se* invalid. Rather, and like in *Wotton v Queensland*,[7] had the Council resolved to designate an area as a Speakers Corner any question of validity would arise in determining whether the exercise of the power of designation by the Council was

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[1] *Local Government Act 1999* (SA) s. 4. See *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 338 [8], fn 2; *Corneloup v Adelaide City Council* [2010] SADC 144; (2010) 179 LGERA 1 at 9 [21] and 11 [23].

[2] *Corneloup v Adelaide City Council* [2010] SADC 144; (2010) 179 LGERA 1 at 11 [23].

[3] As to the relevance of the practical operation of a law, see *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 243 CLR 1 at 12 [2], 20-21 [25] per French CJ, 56-57 [151] per Gummow and Bell JJ and 75 [218] per Hayne J.

[4] See *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 338 [6]-[7]; *Corneloup v Adelaide City Council* [2010] SADC 144; (2010) 179 LGERA 1 at 44 [168].

[5] This is an assumption made on the basis of omission from the judgment at first instance and the Full Court decision.

[6] Or designation of an area and exercise of the freedom beyond it.

[7] *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246.

ultra vires.[8] The Full Court accepted that the power to grant or withhold permission in terms of By-Law 2.3 was subject to judicial review[9] and so, no doubt, would be a resolution to designate an area as a Speakers Corner.

10. The consequence of a failure by the Council to resolve to designate an area as a Speakers Corner is not invalidity of By-Law 2.3.[10]

11. The order of the Full Court is to be understood having regard to the jurisdiction exercised by the District Court. Pursuant to s. 276(5)(e) of the *Local Government Act 1999* (SA) the Court's power was to declare a by-law to be invalid upon application by a person with standing. The action was a direct challenge to validity, brought pursuant to s. 276.

12. Both Stretton J[11] and the Full Court[12] proceeded on the basis that the power under s. 276(5)(e) of the *Local Government Act 1999* (SA) included a power to sever. There is no issue that a court has an inherent or common law power to sever and to read down a statute. This power is conditioned by provisions such as s. 13 of the *Acts Interpretation Act 1915* (SA).[13] Section 13 provides:

> "A statutory or other instrument made pursuant to a power conferred by or under an Act will be read and construed so as not to exceed that power, so that, where a provision of the instrument, or the application of a provision of the instrument to any person or circumstances, is in excess of that power, the remainder of the instrument, or the application of the provision to other persons and circumstances, is not affected."

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[8] See *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246 at 252-253 [21]-[22] per French CJ, Gummow, Hayne, Crennan and Bell JJ. The observations of McCallum J in *Liu v The Age Company Ltd* [2012] NSWSC 12; (2012) 257 FLR 360 at [50]-[56] are not inconsistent with this proposition.

[9] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 373-374 [158]. See also the Appellant's Submissions at [38] in relation to the avenues of judicial review available under South Australian law.

[10] The following submission as to reading down of By-Law 2.3 is advanced in addition to the submission of the Appellant. The submission of the Appellant does not require consideration of the significance of the designation of Speakers Corners.

[11] *Corneloup v Adelaide City Council* [2010] SADC 144; (2010) 179 LGERA 1 at 44 [168].

[12] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 376 [171] and [173].

[13] See also s. 22A of the *Acts Interpretation Act 1915* (SA).

13. In this matter, the Full Court severed words from By-Law 2.3 and declared By-Law 2.8 to be invalid. Reading down to preserve validity was rejected.[14]

14. Both reading down and severance require that the Court not "perform a feat which is in essence legislative and not judicial";[15] each require that effect be given to the legislative purpose of the provision and that its purpose not be undermined by severance or reading down.[16] Of course, reading down inspires greater subtlety than the strictures of the severing blue pencil.

15. Having regard to s. 13 of the *Acts Interpretation Act 1915* (SA),[17] By-Law 2.3 can be read down to give effect to its purpose.[18] The relevant purpose is to facilitate haranguing, preaching and canvassing speech (including political speech) in specified areas (on roads), and to permit the Council to condition it beyond these areas (on roads).

16. If By-Law 2.3 would not be invalid upon a resolution of the Council to designate road areas as Speakers Corners, no declaration pursuant to s. 276(5)(e) of the *Local Government Act 1999* (SA) should be made. If the Council fails to resolve to designate road areas as Speakers Corners[19] then, on a prosecution of a person for contravening By-Law 2.3, the by-law would be understood as only creating an offence to preach, canvass or harangue on a road beyond an area lawfully designated as a Speakers Corner, upon a lawful resolution of the Council to so designate the area. In the event that the Council does not lawfully resolve to designate areas as Speakers Corners, no offence would have been committed.

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[14] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 376 [169]-[171].
[15] *Pidoto v Victoria* (1943) 68 CLR 87 at 109 per Latham CJ.
[16] *State of Victoria v Commonwealth* [1996] HCA 56; (1996) 187 CLR 416 at 502 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ. See also *Pidoto v Victoria* (1943) 68 CLR 87 at 108 per Latham CJ; *Re Dingjan; Ex parte Wagner* [1995] HCA 16; (1995) 183 CLR 323 at 348 per Dawson J.
[17] See also *Acts Interpretation Act 1915* (SA) ss. 22A and 14A.
[18] This is subject to the observation that s. 13 of the *Interpretation Act 1915* (SA) is expressed to operate only where the issue is whether the by-law exceeds the enabling power; and (on one view) not whether it infringes the freedom of political communication, unless that question arises in the context of implied limitation on the power exercisable under the enabling Act. It might also be observed that the provision operates with some difficulty where the power being exercised is under s. 276(5)(e) of the *Local Government Act 1999* (SA); that is to declare a by-law to be invalid. A determination that "application of the provision to other persons and circumstances is not affected" by a reading down of the by-law is a process that can accompany a refusal to declare a by-law to be invalid, or a declaration that a by-law is not invalid.
[19] Or if it is established that this power of designation is exercised in a manner that infringes the freedom of political communication.

17. Consideration of the validity of By-Law 2.3, on an understanding that the by-law "banned all public speaking in Adelaide streets and thoroughfares",[20] involved testing validity premised upon an extreme hypothesis as to the scope of operation of the provision.

***Second* - validity as an exercise of the rule making power - invalidity as an infringement of the implied freedom of political communication**

18. The Full Court determined that By-Laws 2.3 and 2.8 were validly made pursuant to s. 667(1)(9)(XVI) of the *Local Government Act 1934* (SA).[21]

19. The Full Court determined validity by applying the "reasonable proportionality test of validity", as explained in *South Australia v Tanner*:[22]

> "... namely, whether the regulation is capable of being considered to be reasonably proportionate to the pursuit of the enabling purpose... The same test, in relation to a power limited to regulation, was expressed by Dixon J. in *Williams*,[23] as being, in substance, whether the regulation goes beyond any restraint which could be reasonably adopted for the prescribed purpose."

20. There is no basis in this matter to question the authority of *South Australia v Tanner* in this respect.[24]

21. Kourakis J treated as discrete the question of validity of the by-laws, as being reasonably proportionate to s. 667(1)(9)(XVI) of the *Local Government Act 1934* (SA), and that of invalidity of the by-laws, as infringing the implied freedom of political communication.[25] It is difficult to contend that a rule making body has power to enact subsidiary legislation that contravenes or is inconsistent with the

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[20] This is perhaps most extravagantly expressed by the trial judge in *Corneloup v Adelaide City Council* [2010] SADC 144; (2010) 179 LGERA 1 at 12 [29].

[21] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 340-341 [22], 365-366 [120] and 367 [129]. The section provided, in effect, that the Council could make by-laws for the "good rule and government of the area, and for the convenience, comfort and safety of its inhabitants".

[22] *South Australia v Tanner* [1989] HCA 3; (1989) 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ.

[23] *Williams v Melbourne Corp* [1934] VLR 18; (1933) 49 CLR 142 at 156.

[24] The utility of the notion of "proportionality" has been questioned in other contexts and particularly in respect of enactments made pursuant to non-purposive powers: see *Rowe v Electoral Commissioner* [2010] HCA 46; (2010) 243 CLR 1 at 59-60 [162] per Gummow and Bell JJ; *Theophanous v Commonwealth* [2006] HCA 18; (2006) 225 CLR 101 at 127-128 [68]-[71] per Gummow, Kirby, Hayne, Heydon and Crennan JJ; *Leask v Commonwealth* [1996] HCA 29; (1996) 187 CLR 579 at 593-595 per Brennan CJ, 600-606 per Dawson J, 613-615 per Toohey J, 616 per Gaudron J, 616-617 per McHugh J, 624 per Gummow J and 634-635 per Kirby J.

[25] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 373 [156] and 374 [161]-[162]. The matter referred to by his Honour at the end of 373 [156] is referred to later in the judgment at 376 [172].

implied freedom of political communication.[26] In considering whether the by-laws infringe the implied freedom of political communication, the second of "the *Lange*[27] questions" requires that regard be had to the purpose underlying the by-laws (or the "enabling purpose"[28]). Whether the by-laws are reasonably appropriate and adapted to serve a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government, requires consideration of the enabling purpose. If the by-law is reasonably proportionate to the enabling purpose (in the *Tanner* sense), there could be no issue that the end is legitimate (in the *Lange* sense).

10 22. Kourakis J characterized the enabling statutory provision as empowering the making of by-laws "for the convenience, comfort and safety of its inhabitants".[29] By-Laws 2.3 and 2.8 centrally concern safety. The haranguing of people on roads in the City of Adelaide is a matter far more extensive than convenience. Distribution of written material on roads gives rise to obvious safety issues.

23. It is submitted below at [28] that the convenience and safety of those uninterested in being harangued, preached at or canvassed with political speech (or any other kind of speech), or harassed by having written political (or other) material thrust at them, is neither trivial, illegitimate or unimportant.

***Third* - the *Lange* questions**

20 24. The law is stated in *Wotton v Queensland*:[30]

> "Two questions (the *Lange* questions) arise... The first question asks whether in its terms, operation or effect, the law effectively burdens freedom of communication about government or political matters. If this is answered affirmatively, the second question asks whether the law nevertheless is reasonably appropriate and adapted to serve a

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[26] In considering whether a by-law is *ultra vires* s.667(1)(9)(XVI) of the *Local Government Act 1934* (SA), the by-law is to be considered having regard to s. 248 of the *Local Government Act 1999* (SA), which operates by virtue of s. 668 of the *Local Government Act 1934* (SA). Section 248 relevantly provides that: a by-law made by a council must not— (b) be inconsistent with this or another Act, or with the general law of the State; or (d) unreasonably interfere with rights established by law; or (e) unreasonably make rights dependent on administrative and not judicial decisions.

[27] *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520.

[28] *South Australia v Tanner* [1989] HCA 3; 166 CLR 161 at 165 per Wilson, Dawson, Toohey and Gaudron JJ. See also *Ousley v R* [1997] HCA 49; (1997) 192 CLR 69 at 114 per McHugh J.

[29] *Local Government Act 1934* (SA) s. 667(1)(9)(XVI). Kourakis J referred to the power to make by-laws for the convenience, comfort and safety of inhabitants as "the convenience power": *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 350 [60].

[30] *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246 at 253 [25] per French CJ, Gummow, Hayne, Crennan and Bell JJ.

> legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government."

25. There is no issue in this matter as to the first question.[31] It can not be doubted that the general law recognises a privilege to distribute printed material relevant to the maintenance of the constitutionally prescribed system of government in Australia in the same way as there is a general law privilege to speak about such matters.[32]

26. The second question is to be approached with an appreciation that limitation of speech, including political speech, and limitations upon distribution of printed political material, are not *per se* incompatible with the maintenance of the constitutionally prescribed system of government in Australia. Examples of permissible regulation are numerous. A person can be restrained from interrupting the proceedings of this court to make a political speech. Parliament can validly prohibit protesting in hunting grounds in the interests of public safety,[33] regulate the distribution of handbills to avoid waste and litter on city streets[34] and prescribe public demonstrations in busy shopping malls which cause disruption for the public and retailers.[35] American First Amendment jurisprudence, though accepting that city streets and parks have been an important site for public protest from time immemorial,[36] recognises limitations on speech having regard to matters such as control of crowds and traffic,[37] maintaining the general comfort and convenience of the public,[38] avoidance of multiple simultaneous demonstrations[39] and preserving the aesthetic value of particular areas.[40]

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[31] This matter does not provide a vehicle to consider the view of Heydon J in *Wotton v Queensland* [2012] HCA 2; (2012) 86 ALJR 246 at 257-258 [48]-[53], that if the answer to the first *Lange* question will inevitably be yes, whether the inquiry is simply a fiction or the question rhetorical and, if so, whether there is a need to consider the utility or appropriateness of the first inquiry.

[32] It is necessary that there be some relevant right or privilege under the general law: *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579 at 622 per McHugh J; *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLR 181 at 303 [354] per Heydon J.

[33] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579.

[34] *Meyerhoff v Darwin City Council* [2005] NTSC 19; (2005) 190 FLR 344.

[35] *Sellars v Coleman* [2000] QCA 465; (2001) 2 Qd R 565.

[36] *Hague v Committee for Industrial Organization* 307 US 496 (1939) at 515-516 per Roberts J (with whom Black J concurred); *Perry Education Association v Perry Local Educators' Association* 460 US 37 (1983) at 45 per White J (for the majority).

[37] *Heffron v ISKCON* 452 US 640 (1981) at 647-50 per White J (for the majority); *Cox v New Hampshire* 312 US 569 (1941) at 574 per Hughes CJ (for the Court).

[38] *Hague v Committee for Industrial Organization* 307 US 496 (1939) at 515-516 per Roberts J (with whom Black J agreed).

[39] *Cox v New Hampshire* 312 US 569 (1941) at 576 per Hughes CJ (for the Court).

[40] *Clark v Community for Creative Non-Violence* 468 US 288 (1984) at 296 per White J (for the majority).

27. Relevant is the observation of Hughes CJ (for the Court) in *Cox v New Hampshire* 312 US 569 (1941) at 574:

> "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."

28. In respect of By-Law 2.3, the designation of areas on roads in which people are protected from being harangued, preached at or canvassed with speech, including political speech, is not *per se* incompatible with the maintenance of the constitutionally prescribed system of government in Australia.[41] The validity of regulation of political speech is not to be approached from a perspective or premise that legislation or executive action can not limit a person's desire to express their political views wherever, whenever and howsoever they choose or to "put their message in a way that they believed would have the greatest impact on public opinion".[42] Several observations support these conclusions. It is almost certainly the case that the overwhelming majority of people on roads (in the City of Adelaide and elsewhere) do not wish to be harangued, preached at or canvassed by strangers with political or any other form of speech. It is also almost certainly the case that haranguing political speech directed at a person who does not wish to hear it creates a risk of physical confrontation. As such, the by-law protects the safety and comfort of haranguers and the harangued, preachers and their "flock". The interests of those not wishing to be harangued, preached at or canvassed with political speech by strangers on roads are more acute than those not wishing to be subjected to political speech on television, on telephones, on the internet and on radio. Uninterested viewers and listeners can, with a flick of the remote, button, mouse or switch, simply turn off and disengage from this political speech, without pressure or recourse from the advertiser. This is not the case with those subjected to unwanted political speech while walking, jogging, cycling or driving along roads.

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[41] Again, this submission is in addition to that advanced by the Appellant and is premised upon the construction of By-Law 2.3 dealt with above.

[42] *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579 at 625 per McHugh J.

29. So long as the power of designation of areas as Speakers Corners is exercised lawfully, in the sense of consistently with the implied freedom of political communication, those interested in hearing political speech on roads in Adelaide would, no doubt, be assisted by the designation of areas for this purpose. Such interested people could then attend an area (or areas) where they know that political speeches will most likely be made. The designation of such areas inevitably enhances "political speech" by encouraging those wishing to speak to do so in an area set aside for it and allowing those wishing to listen to do so in an area identified and known for such.

10 30. In respect of By-Law 2.8, in determining whether the permit system created by the by-law serves a legitimate end in a manner compatible with the maintenance of the constitutionally prescribed system of government, it is unnecessary to go much beyond the analysis of Kourakis J at [127]-[128].[43] In respect of By-Law 2.8, his Honour paid no regard to these matters, or to whether By-Law 2.8 gave rise to any issues distinct from By-Law 2.3, in considering the second *Lange* question.[44]

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DATED the 3rd day of July 2012

G R Donaldson SC
Solicitor-General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385

R B Phillips
State Solicitor's Office
Telephone: (08) 9264 1107
Facsimile: (08) 9264 1111

[43] *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 367 [127]-[128].
[44] See, in particular, *Corporation of the City of Adelaide v Corneloup* [2011] SASCFC 84; (2011) 110 SASR 334 at 373 [157].